SRI HARTAMAS DVPT. SDN. BHD.

v.

MBf FINANCE BHD.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 02-274-91]
17 AUGUST 1991

COMPANY LAW: *Winding-up - Company unable to pay its debts - Provisional liquidator appointed - Application for order of stay of order pending appeal against winding-up order - Locus standi of applicant company to apply for order of stay pending appeal - Power of board of directors to instruct Counsel - Residual power of appeal - Powers which have passed to provisional liquidator - Companies Act 1965, ss. 243(1), 253(2) - Courts of Judicature Act 1964, s. 44(1).*

On 18 July 1991 a winding up order was made against the applicant company wherein it was ruled that the company was unable to pay its debts. An official receiver was appointed as provisional liquidator. An appeal against the winding up order was filed. The present motion before the Court was for an order of stay of the winding-up order pending disposal of the appeal. The affidavit in support of this motion was made by the solicitors of the company stating that as solicitors, they were making the application for stay pending disposal of the appeal.

The company contended that it was able to settle its debts and was therefore solvent. The respondent raised a preliminary objection in that the applicant had no *locus standi* to make this application for stay as s. 243(1) of the Companies Act 1965 (the Act) provides that such an application can only be brought by the liquidator or any creditor or contributory.

Held:

[1] Under s. 243(1) of the Act, after an order for winding-up has been made by the Court, the application for stay of all proceedings relating to the winding-up may be made only by the liquidator or any creditor or contributory. Any other person is not qualified to apply for stay.

[2] In this case as the application for stay was not properly filed before the Court as required under s. 243(1) of the Companies Act, the preliminary objection was upheld.

[3] Under s. 253(2) of the Act an appeal can be made to this Court against an order for the winding-up of a company.

[4] Section 44(1) of the Courts of Judicature Act provides that where there is a right of appeal it is implicit that there is also a right to make any incidental application in respect of a pending appeal to this Court. The issue was who should move the appeal on behalf of the company.

[5] The board of directors of a company, notwithstanding the appointment of a provisional liquidator, retains certain residuary powers which includes the authority to instruct solicitors and Counsel to oppose the petition and if a winding-up order is made, to appeal against such an order. The power to instruct solicitors and Counsel is not a power which anyone could suggest has passed to the provisional liquidator. Despite the fact that a liquidator has been appointed, a residual power of appeal remains vested in the directors.

[Motion for stay dismissed with costs.]

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG SYARIKAT: *Penggulungan - Syarikat tidak dapat membayar hutangnya - Lantikan penyelesai sementara - Permohonan untuk penangguhan semasa menunggu perbicaraan rayuan - Locus standi syarikat untuk membuat permohonan untuk penangguhan - Kuasa lembaga pengarah untuk memberi arahan kepada peguam - Kuasa baki untuk merayu - Kuasa yang ada pada penyelesai sementara - Akta Syarikat 1965, ss. 243(1) & 253(2) - Akta Mahkamah Kehakiman 1964, s. 44(1).*

Pada 18 Julai 1991, satu perintah penggulungan telah dikeluarkan terhadap syarikat pemohon dan seorang pegawai penerima telah dilantik sebagai penyelesai sementara. Satu rayuan terhadap perintah penggulungan telah difailkan. Usul yang kini di hadapan Mahkamah adalah permohonan untuk menangguhkan perintah penggulungan sehingga rayuan dibicarakan. Pemohon berhujah bahawa ia mempunyai kesanggupan membayar hutang (solvent).

Pihak responden membuat bantahan permulaan dan menyoal sama ada pihak syarikat mempunyai *locus standi* untuk mendengar usul ini kerana s. 243 Akta Syarikat 1965 (Akta tersebut) menyarankan bahawa permohonan untuk penangguhan hanya boleh dikendalikan oleh penyelesai, pemiutang atau contributori.

Diputuskan:

[1] Di bawah s. 243(1) Akta tersebut, selepas perintah penggulungan diberi oleh Mahkamah, permohonan untuk penangguhan prosiding yang berkenaan dengan penggulungan hanya boleh dikendalikan oleh penyelesai, pemiutang atau contributori.

[2] Di dalam kes ini, oleh kerana permohonan penangguhan tidak difailkan dengan betul di Mahkamah seperti yang dikehendaki di bawah s. 243(1) Akta tersebut, bantahan permulaan disokong. Walau bagaimanapun, oleh kerana dalam kes ini pihak yang betul tidak membuat permohonan untuk penangguhan, permohonan tersebut tidak sah disisi undang-undang.

[3] Di bawah s. 253(2) Akta tersebut rayuan boleh dibuat ke Mahkamah Agung terhadap keputusan atau perintah penggulungan.

[4] Seksyen 44(1) Akta Mahkamah Kehakiman 1964 menyarankan bahawa apabila terdapat hak rayuan, adalah tersirat bahawa juga wujudnya hak untuk membuat sebarang permohonan yang berkaitan dengan rayuan yang sedang menunggu perbicaraan. Soalannya ialah siapakah yang boleh merayu untuk pihak syarikat.

[5] Walaupun penyelesai sementara telah di lantik kepada sesuatu syarikat, lembaga pengarah masih mempunyai kuasa bakian (residual powers) termasuk memberi arahan kepada Peguam untuk mencabar petisyen penggulungan dan sekiranya perintah penggulungan dikeluarkan, untuk membuat rayuan terhadap perintah tersebut. Kuasa untuk memberi arahan kepada Peguam bukanlah sesuatu kuasa yang boleh diberi kepada penyelesai sementara. Walaupun penyelesai telah dilantik, kuasa bakian untuk merayu masih terletak kepada pengarah-pengarah.

[Usul untuk penangguhan di tolak dengan kos.]

Cases referred to:

Brinds Ltd. & Ors. v. Offshore Oil NL & Ors. [1985-86] 10 ***(cons)***
Re Diamond Fuel Co. [1879] 13 Ch D 400 ***(cons)***
Re Union Accident Insurance Co. Ltd. [1972] 1 All ER 1105 ACLR 242 ***(cons)***

Legislation referred to:

Companies Act 1965, ss. 4, 243(1), 253(2)
Courts of Judicature Act 1964, s. 44(1)

Other source referred to:
McPherson Company Law, 2nd Edn., p. 394 et seq.

For the appellant - G. Sri Ram (M.S. Murthi with him); M/s. Murthi & Partners
For the respondent - Loh Siew Cheang (Ranjit Singh with him); M/s. Cheang & Ariff
For the official receiver - Norin Badaruddin, Federal Counsel

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

On 18 July 1991 a winding-up order was made by the High Court Kuala Lumpur (Zakaria Yatim J) against Sri Hartamas Development Sdn. Bhd. (the applicant in the motion before us) after ruling that the company had been unable to pay its debts consisting of claims by judgment creditors totalling RM37.1 million and claims by supporting creditors amounting to RM1.4 million. On the same day an application for stay was refused by the same learned Judge who also appointed the Official Receiver as provisional liquidator.

An appeal against the winding-up was filed on 20 July 1991. The motion before this Court was for an order of stay of the winding-up order pending disposal of the appeal.

In the affidavit in support of the motion the grounds given for the application for stay was that in actual fact the company had very much more assets than debts, could settle all the debts and was therefore not insolvent. It is said that the company had its assets valued by an international valuer, Jones Lang Wooton, at RM597,590,000.

At the commencement of the hearing of the motion Mr. S.C. Loh, Counsel for the respondent, MBf Finance Bhd. raised a preliminary objection that the applicant was not one of the persons described in s. 243(1) of the Companies Act 1965 to make the application for stay. It was contended by Mr. Loh, quite correctly in our view, that under s. 243(1) of the Act after an order for winding-up has been made by the Court the application for stay of all proceedings relating to the winding-up may be made only by the liquidator or any creditor or contributory. Thus any other person is not qualified to apply for stay under that section. Upon such application under s. 243(1) of the Act the Court may order stay of the proceedings on such terms and conditions as the Court may think fit.

It is also not disputed that the word "Court" appearing in s. 243 means "the High Court" as defined in s. 4 of the Act.

However in our view Mr. Loh was not with respect correct if he said that the company could not appeal at all against the winding-up order. It is provided quite clearly in s. 253(2) of the Act:

> ...that subject to the rules an appeal from any order or decision made or given in the winding-up of a company shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court in cases within its ordinary jurisdiction.

Therefore under that provision an appeal can be made to this Court against an order for the winding-up of a company.

Where there is a right of appeal it is implicit that there is also a right to make any incidental application in respect of a pending appeal to this Court. The authority for this is to be found in s. 44(1) of the Courts of Judicature Act 1964 itself which reads as follows:

> In any proceeding pending before the Supreme Court any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the

dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Supreme Court.

In respect of the present motion before us it is to be observed that there is only one affidavit in support of the motion and the affidavit is by the solicitors of the company and which affidavit merely states that as solicitors of the company they are making the application for stay pending disposal of the appeal. The rest of the affidavit deals with the grounds relied on for the application for stay.

In *Re Union Accident Insurance Co. Ltd.* [1972] 1 All ER 1105 it was held *inter alia* that notwithstanding the appointment of the provisional liquidator and the general assumption by him of the company's powers the board still retained certain residuary powers which included authority to instruct solicitors and Counsel to oppose the petition and if a winding-up order is made, to appeal against the order. In that case it was also held that the power to instruct solicitors and Counsel is not the powers which any one could suggest has passed to the provisional liquidator. At p. 1113 Plowman J said:

> The issue is to the extent of those residuary powers, and in particular whether they extend to the launching of the present motion. I think that it may sometimes be helpful to test the matter by considering the other side of the coin, namely to enquire whether the power which the board is said to have lost is one which can be said to have been assumed by the liquidator. If the answer is that it cannot, that may be a good reason for saying that the board still retains it. Clearly, for example, as I have already indicated, the power to instruct solicitors and Counsel on the hearing of the winding-up is not a power which anyone could suggest has passed to the provisional liquidator and therefore the board retains it. If that is true in regard to the petition itself, it is, my judgment equally true of interlocutory proceedings which are such that it would not be appropriate for the provisional liquidator to give instructions on behalf of the company.

Plowman J's decision found support in the Supreme Court of Victoria, Australia (where our Companies Act 1965 came from) in *Brinds Ltd. & Ors. v. Offshore Oil NL & Ors.* [1985-86] 10 ACLR 242 where in the judgment of that Court the following passage appears:

> During the argument, I raised the question whether the applicant Brinds Ltd. having been in liquidation since December 1983 and throughout apparently insolvent, had any *locus standi* to make, itself, this application for a stay, as distinct from on the one hand, such an application made by or with the consent of the liquidator and, on the other hand, a different application by others under s. 383 of the Code.
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> Since then, the researches of Nicholson J have discovered that ingenious Counsel in 1879 raised the question and put the negative answer to the Court of Appeal in England in *Re Diamond Fuel Co.* [1879] 13 Ch D 400 - see especially pp. 404-5. Nearly 100 years later, in *Re Union Accident Insurance Co. Ltd.* [1972] 1 All ER 1105 at 1112-3, Plowman J suggested what I think are substantial reasons for an affirmative answer and, in any event, I think this Court should proceed on the footing that the directors of Brinds Ltd. have power to bring the present application in the name of the company. See also *McPherson Company Law*, 2nd Edn., p. 394 et seq.

Re Diamond Fuel Co. [1879] Ch D 400 is also authority for the proposition that despite the fact a liquidator had been appointed, a residual power of appeal remains vested in the directors.

After a winding-up order is made generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order. In our case it is expressly provided in s. 253(2) of the Act. The question is only who should move the appeal on behalf of the company.

a An earlier decision of this Court in *Rajannan s/o Ravaniah & Ors. v. Sivalingam s/o Arumugam Karuppiah* Civil Appeal No. 02-41-1990 is to be distinguished. There the notice of motion for stay and the supporting affidavits were filed by the directors and shareholders of Tamil Osai Sdn. Bhd. the company, and they together with the company filed a motion for stay of the winding-up order pending appeal. The application for stay was allowed by this Court although the appeal itself was subsequently dismissed.

b As the present motion before us was not properly before the Court we upheld the preliminary objection and dismissed the motion with costs.

Also found at [1991] 3 CLJ 2078

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